Sam's Club, A Division of Wal-Mart Corporation a*nd* Alan T. Peto *and* United Food and Commercial Workers International Union, AFL–CIO, CLC. Case 28–CA–16669, 28–CA–16939, and 28–CA–16954

July 29, 2004

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

On December 6, 2001, Administrative Law Judge Thomas Michael Patton issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Union filed answering briefs, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions, except as modified below, and to adopt the recommended Order as modified.[2]

The judge found, among other things, that the Respondent violated Section 8(a)(1) of the Act on June 26, 2000,[3] by coercively interrogating employee Alan Peto, creating the impression that his protected concerted activities were under surveillance, and threatening him with reprisals if he did not abandon his concerted activity and use the Respondent's "open door" policy to bring his concerns to the attention of management.[4] The judge also found that the Respondent violated Section 8(a)(1) by issuing a decisionmaking day ("D-day") disciplinary warning to Peto on July 28, and by threatening him with termination in the D-day warning. With the exception of the June 26 threat of reprisal, we agree with the judge, as explained below.

The June 26 Conduct

The testimony credited by the judge establishes that on June 25 Store Business Manager Donna Burton asked Peto if he knew about "anything in writing going around, something about wages." Although Peto had been circulating a petition complaining of possible unfair wage and training practices, he responded, "No." On June 26, at the start of Peto's shift, Burton asked Peto to step into Store Manager Greg Roberts' office. Roberts was seated at his desk. Another manager was looking through files in the office and did not participate in the ensuing meeting. As Burton sat silently, Roberts asked Peto, "what's going on?" When Peto feigned ignorance, Roberts said that he had heard that Peto was circulating a petition concerning wages. Peto said he did not want to discuss the matter. Roberts then reminded Peto that the Respondent had an open door policy and advised that he (Roberts) could not address employees' concerns unless they were brought to his attention.

We agree with the judge, for the reasons stated in his decision, that Roberts unlawfully interrogated Peto in the July 26 meeting. Contrary to our dissenting colleague, we also affirm the judge's finding that Roberts created an impression that employees' protected activities were under surveillance.

The test for whether an employer unlawfully creates an impression of surveillance is whether under the circumstances, the employee reasonably could conclude from the statement in question that his protected activities are being monitored. *Mountaineer Steel, Inc.*, 326 NLRB 787 (1998), enfd. 8 Fed.Appx. 180, 2001 WL 431487 (4th Cir. 2001). The Board does not require that an employer's words to an employee reveal on their face that the employer acquired its knowledge of the employee's activities by unlawful means. See *United Charter Service*, 306 NLRB 150, 151 (1992). Roberts' telling Peto

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule a judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

The judge dismissed allegations that the Respondent violated the Act by interrogating Peto on June 25 and maintaining and enforcing an overly broad and discriminatory no-solicitation rule with respect to him. He also dismissed allegations that in an August conversation with Kelley the Respondent violated the Act by creating the impression of surveillance, interrogating Kelley, threatening him with a loss of employment and closure of the facility, inviting his resignation, and promulgating and enforcing an overbroad and discriminatory no-solicitation rule. Lastly, the judge dismissed allegations that the Respondent disciplined Kelley in violation of Sec. 8(a)(3) and (1), and that the D-day discipline issued to Peto also violated Sec. 8(a)(3). In the absence of exceptions, we adopt these findings.

[2] We have modified the order, in part, to conform to the judge's finding that the language of the July 28, 2000 disciplinary notice issued to employee Alan Peto contained a threat of termination that was independently unlawful. We shall substitute a new notice to conform to the modified Order and to the Board's decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), enfd. 354 F.3d 534 (6th Cir. 2004).

[3] All dates refer to 2000 unless otherwise indicated.

[4] We find it unnecessary to pass on the Respondent's exception that the judge impermissibly relied on the affidavit of business manager Donna Burton in reaching these findings because the affidavit was taken without the Respondent's counsel being present. Burton's testimony at the hearing and that of other witnesses amply supports the judge's findings even in the absence of the affidavit.

that he "heard Peto was circulating a petition about wages" leads reasonably to the conclusion that the Respondent had been monitoring Peto's activities. Peto did not circulate the petition openly, and Roberts never revealed how he came by the information.

Our dissenting colleague agrees that Roberts unlawfully interrogated Peto. He then posits that Peto would necessarily understand, from being interrogated himself, that the Respondent learned that he was circulating petition through "open questioning" of other employees. It is speculative to conclude that Peto would infer that a source of Roberts' information was the questioning of other employees. In any event, had Peto reasonably understood that the Respondent was engaging in the interrogation of his fellow associates about his protected activities, the effect would have been the same: to interfere with Peto's exercise of Section 7 rights.

Although we affirm the judge's findings that the Respondent unlawfully interrogated Peto and created an impression of surveillance on June 26, we disagree with the judge that the Respondent threatened Peto with reprisals for engaging in protected activity. Nothing in the credited testimony conveys an actual or implied threat that Peto or his coworkers would suffer adverse consequences for failing to voice their problems directly to Roberts. Unlike the language of the D-day warning that was issued to Peto 1 month later, which specifically advised Peto that he could be terminated for engaging in protected conduct, Roberts' reminder to Peto that the Respondent had a procedure in place for addressing employee concerns neither explicitly nor implicitly threatened adverse consequences for engaging in protected activity. Accordingly, we reverse the judge's finding that the Respondent threatened Peto with unspecified reprisals in violation of Section 8(a)(1).[5]

The July 28 Discipline

The judge also found that the Respondent violated Section 8(a)(1) when Director of Operations Scott Voth issued D-day discipline to Peto in July for carrying a concealed tape recorder and threatened him with termination in the language of the D-day warning. In affirming these findings, we agree with the judge that the General Counsel established that the discipline Peto received was motivated by animus toward his protected activities.[6] We also find that the judge properly placed on the Respondent the burden to establish that it would have imposed third-step discipline on Peto irrespective of his protected activity one month earlier. *Wright Line*, 251 NLRB 1083 (1980), enfd. 622 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). *Cadbury Beverages, Inc.*, 324 NLRB 1213, 1221 (1997); *Formosa Plastics Corp., Louisiana*, 320 NLRB 631, 647–649 (1996). And, we agree with the judge that the Respondent failed to carry that burden.

The record reveals that Peto was an exemplary 7-year employee. He was rated "outstanding" in 6 of 10 categories on his performance evaluation, and "exceeds requirements" in the other four categories, only days before the Respondent learned that he was circulating the wage petition. Voth testified that in the past, managers needed only to talk to Peto about a company policy in order to correct him. Yet 1 month after summoning Peto to the store manager's office and subjecting him to unlawful coercion, the Respondent asserts, it was necessary to impose discipline on Peto that was one step shy of discharge, and that could result in termination for any other infraction within a year. The judge essentially discredited this assertion in the absence of evidence that the same or analogous misconduct resulted in the imposition of the same or similar discipline.[7]

Evidence of this sort would have tended to demonstrate why an exemplary employee like Peto was nevertheless given a disciplinary ultimatum that otherwise seems inexplicable, considering that a discriminatory motive has already been established. Had the Respondent produced a rule or policy prohibiting taping or similar conduct, Peto's discipline might have been explained as merely an instance of the Respondent following its own guidelines, as opposed to a reprisal directed at Peto's protected, concerted activity. Contrary to the dissent's suggestion, we do not hold that an employer may never impose discipline for misconduct that was unprecedented or not specifically addressed by the employer's prior rules or policies. Our point, rather, is that the absence of such evidence here is telling under the circumstances, given the Respondent's unlawful motive and Peto's exemplary record.

The July 28 Threat

We also find, as the judge did, that the D-day warning threatened Peto with termination if he engaged in protected concerted activity. Telling Peto in the D-day

[5] The judge relied in part on the purported June 26 threat of reprisal in finding that the Respondent unlawfully disciplined Peto on July 28. Despite our finding that the Respondent made no such threat on June 26, we find that the Respondent's other conduct on that date supports the finding that the July 28 discipline violated the Act.

[6] Voth acknowledged that Roberts informed him about Peto's circulation of the wage petition at the same time Roberts told him about the tape recorder.

[7] Our dissenting colleague's suggestion that the judge's analysis would always result in a violation whenever the misconduct had not previously occurred overlooks the fact that discipline for analogous conduct may support the Respondent's affirmative defense. Indeed, the dissent implies that discipline could *never* be found to be unlawful in a dual motive case if it is issued in connection with novel misconduct.

warning that he would be terminated if any associates complained about his conduct, after coercively interrogating him about circulating the wage petition and giving him the impression that that protected activity was under surveillance, would reasonably lead him to believe that he risked discharge if he engaged in protected activity in the future.

Our dissenting colleague chooses to construe the D-day warning much more narrowly than its broad language conveys. We cannot agree. Although it refers to employees' awareness that Peto "conceal[ed]" a tape recorder to record conversations with managers, the warning makes clear that Peto will be terminated "if there is *any* feedback" from other employees about "*any* type of conduct" by him which affects morale negatively. (Emphasis added.) Certainly, the D-day warning may reasonably be construed to prohibit activity within the realm of Section 7, such as circulating a wage petition. Accordingly, we find that the Respondent violated Section 8(a)(1) by threatening him with termination if he engaged in protected activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Sam's Club, a Division of Wal-Mart Corporation, Mountain Spring Road, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 1(c):

"(c) Threatening employees with termination for engaging in concerted activities protected by the Act.

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. July 29, 2004

Wilma B. Liebman, Member

Dennis P. Walsh, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

CHAIRMAN BATTISTA, dissenting in part.

Contrary to my colleagues I do not find that the Respondent violated Section 8(a)(1): by issuing employee Alan Peto a "D-day" disciplinary warning on July 28, 2001; by language contained in that written warning; or by allegedly creating the impression of surveillance.

As to the imposition of the "D-day" discipline, even assuming arguendo that the General Counsel met his initial burden of proving that the Respondent's animus toward Peto's protected activities was a motivating factor in the July 28 discipline, I find that the Respondent has met its rebuttal burden of establishing that it would have issued the D-day discipline regardless of any of Peto's protected activities. The judge expressly acknowledged that "[s]ecretly bringing a tape recorder to work to make surreptitious recordings of conversations," including a conversation with director of operations Voth, was conduct that reasonably could result in discipline.[1] Nonetheless, the judge found that the D-day discipline was unlawful. He concluded that the Respondent failed to demonstrate that Peto would have received this specific discipline, as opposed to some lesser punishment, but for his earlier protected activity. The judge placed on the Respondent the burden of showing that similar transgressions have resulted in similar discipline. In my view, this burden makes no sense in this context. The judge's analysis would result in a violation in any situation where the misconduct has not previously occurred. Where, as here, the conduct is of such a nature as to warrant discipline, the fact that the conduct has never occurred before cannot detract from the validity of the discipline.

My colleagues assert that an employer accused of discriminatory discipline may have an affirmative defense if he can show that a prior employee was subjected to the same discipline for "analogous conduct." However, there may be instances, and this case is one of them, where no employee has previously engaged in the conduct involved herein (surreptitious tape-recording at work) or in analogous conduct. As set forth above, that does not immunize the conduct from discipline.

Similarly, the fact that the Respondent had no rule or policy about surreptitious taping does not immunize the conduct from discipline. A rule or policy cannot envisage all of the types of misconduct in which an employee might conceivably engage. For example an employer may not have an explicit rule or policy against burning down the plant, but surely that would not immunize the conduct from discipline.

Finally, and contrary to the statement of my colleagues, I am not suggesting that discipline for "novel misconduct" would always be privileged. The case would depend in part on the nature of the misconduct. For example, if the "novel misconduct" is minor in nature, there may well be an inference that protected activity, rather than the minor misconduct, was the motive for the discipline. However, the misconduct here was far from minor.

[1] Even the General Counsel does not allege that the tape-recording was concerted protected activity.

I also do not agree that the language of the D-day warning of July 28 independently violated Section 8(a)(1) or that it can be used to bootstrap the otherwise unsupported claim that the July 28 warning was motivated by Peto's earlier protected activities.[2] The warning, issued promptly after Peto's unprotected surreptitious taping, clearly stated that Peto was being disciplined for this misconduct. My colleagues and the judge rely on the warning's proscription against "any type of conduct which effects [sic] morale in a negative fashion". But this language cannot be separated from the context in which it appears. The reference is clearly to the unprotected conduct of tape-recording. There is nothing in the warning that would reasonably lead Peto or other employees to assume that this phrase related to Peto's earlier protected activity.

I also find no support for the judge's finding that the warning, "read in the context of Roberts' unlawful June 26 statement regarding employee complaints," would reasonably be understood by an employee as threatening discharge for protected activity. I agree that, on June 26, Roberts interrogated Peto about circulating the petition. However, as my colleagues acknowledge, Roberts uttered no unlawful threat. Nor is there any credited evidence that Roberts made an unlawful statement at the June 26 meeting about employee complaints.

Finally, as noted, I agree that the Respondent's questioning of Peto on June 26 was an unlawful interrogation. However, I do not agree that it conveyed an impression of surveillance. In my view, Peto would reasonably understand from that question, and from similar questioning the day before, that the Respondent was learning of Peto's activities through open questioning of employees, rather than through surreptitious watching of Peto. Contrary to the assertion of the majority, it would not be "speculative" for a questioned employee to infer that the inquisitive employer is asking other employees similar questions. Concededly, the employee might then be coerced by the inference that other employees are being questioned. However, that does not establish that the employee is under the impression that he is being spied upon. Accordingly, I would not find that the Respondent created an impression of surveillance.

Dated, Washington, D.C. July 29, 2004

Robert J. Battista, Chairman

NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT coercively question you about your concerted activities protected by the Act.

WE WILL NOT create the impression that we are engaging in surveillance of your concerted activities protected by the Act.

WE WILL NOT discipline you because you have engaged in concerted activities protected by the Act.

WE WILL NOT threaten you with termination for engaging in concerted activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Section 7 of the Act.

WE WILL NOT prohibit any employee from using channels outside the immediate employee-employer relationship to voice employee concerns about our employment practices or the need for a union.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful decisionmaking day discipline issued to Alan T. Peto, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discipline will not be used against him in any way.

SAM'S CLUB, A DIVISION OF WAL-MART CORPORATION

[2] The text of the warning provided:

> The following was observed of this Associate's behavior and or performance: Alan was observed concealing a tape recorder and microphone. Alan made other associates aware he was utilizing the recorder to tape record conversations with managers to "cover his butt."
>
> What is the impact of this behavior/performance on customer service, other Associates, and the profitability of the operating unit? *Negative impact on the morale of all Associates within the building. Creates a hostile work environment.*
>
> The behavior expected next time: If there is any feedback from other Associates, action taken by Alan or any type of conduct which effects morale in a negative fashion within the Club Alan will be terminated.

Winkfield F. Twyman, Esq., for the General Counsel.
John B. Nickerson and *Steven D. Wheeless, Esqs. (Steptoe & Johnson),* Phoenix, Arizona, for the Respondent.
Mr. Alan Peto, Las Vegas, Nevada, for the Charging Party.
George Wiszynski, Assistant General Counsel, UFCW International Union, of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

THOMAS MICHAEL PATTON, Administrative Law Judge. I heard this case at Las Vegas, Nevada, on March 27–29, 2001. The charges were filed by Alan T. Peto, an individual, and by United Food and Commercial Workers International Union, AFL–CIO, CLC (the Union). The formal documents establish the filing and service of the charges. Peto filed the initial charge on August 8, 2000.[1] The initial complaint issued on October 31. The final amended consolidated complaint, which issued on February 27, 2001, alleges that Sam's Club, A Division of Wal-Mart Corporation (Respondent or the Employer), violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by discriminating against employees Alan T. Peto and Allen Kelley and by engaging in other conduct that independently violated Section 8(a)(1) of the Act.

The following findings are based on the entire record, including the posthearing briefs filed by the General Counsel, the Employer, and the Union. Many of the facts are not in dispute. In assessing credibility testimony contrary to my findings has not been credited, based on a review of the entire record and consideration of the probabilities and the demeanor of the witnesses. See *NLRB v. Walton Mfg. Co.,* 369 U.S. 404, 408 (1962).

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

The Respondent is a corporation that operates a retail business known as Sam's Club located on Spring Mountain Road in Las Vegas, Nevada (Store 6382), where the Respondent is engaged in the retail sale of food and consumer products. The Respondent admits facts establishing that it meets the Board's jurisdictional standards and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Incidents involving Peto

Alan T. Peto is an employee at Store 6382. At the time of the hearing Peto had worked for the Employer for almost 7 years. His job was membership sales clerk, which involved involving dealing with customers in the sales area. He worked under a team leader. Peto's team leader is not alleged to be a statutory supervisor and that issue was not litigated. Next in the hierarchy above Peto is business manager Donna Burton. At the time of the hearing Burton had been transferred to another of the Employer's stores. Burton's immediate superior was store manager Greg Roberts. Roberts worked under Scott Voth, who was the director of operations of six of Sam's Club stores in Nevada and Arizona. The Employer admits that Burton, Roberts, and Voth were statutory supervisors and agents of the Employer.

In June, sometime before June 25, Peto prepared and circulated a petition among Respondent's employees. The subjects of the petition included the hiring of new employees at higher wage rates than current employees and of new employees being given special consideration for a manager-training program. The first signature on the petition is that of Peto. Eventually 33 employees signed the petition, which is addressed to Tom Grimm, a vice president of the Employer.

a. June 25 conversation between Burton and Peto

On about June 25 Burton had a conversation with Peto at the Store. No one else was present. Burton testified that she approached Peto after a number of employees had come up to her and had told her, that "there was something in writing going around" about wages. She identified one of the employees as Traci Mulhall. Burton testified that Mulhall related that she had not seen what was being circulated and that her report to Burton was based on what she had been told. Burton did not describe the conversations she had with other employees or identify them.[2] Burton insisted that Mulhall had not described the writing as a "petition." She did not specifically deny that she was aware that the writing was a petition, based on her conversations with other employees.

Peto's account of the conversation was as follows:

> Q. And what did she say to you?
> A. She said that she heard there were some things going around the Club and did I know anything about it.
> Q. So what did you say to her?
> A. I said, "I don't know what's going on."
> A. She said, "I know you'd tell me the truth about what's going on."
> Q. What did you say?
> A. That was basically it because we just walked off in our separate paths.
> Q. How long was the conversation?
> A. Very short. Maybe two to five minutes. Not very long.

Burton testified that after closing time that day, and about an hour after Mulhall had given her the report, she spoke with Peto in the electronics department. Burton's account of the conversation was as follows:

> Q. Tell us what was said in the conversation between you and Mr. Peto on or about June 25th, 2000.
> A. I had just asked him if he had heard or seen anything that was in writing going around, something about wages. And his reply was, "No."
> Q. And then what?

[1] All dates are in 2000, unless otherwise indicated.

[2] There is no evidence and no contention that the reports made to Burton by Mulhall and the other employees were the fruits of Sec. 8(a)(1) conduct.

A. He turned around and walked away, and I went on doing my business.

Burton stated that the conversation occurred near Peto's workstation and lasted about a minute. She had known Peto for about 4 years and spoke with him on a daily basis. She credibly testified that she had a friendly relationship with Peto and that in the past they had discussed personal and family matters.

I did not find either Peto or Burton to be particularly impressive witnesses. While Peto is a current employee, he is also an employee of the Union. I accordingly attach less weight to the fact that he is testifying against his employer. Absent any context, it seems improbable that Peto would not have asked Burton what she was talking about, if she had merely said she "heard there were some things going around the Club and did I know anything about it." I credit Burton regarding this conversation because, on balance, Burton's testimony is somewhat more probable and regarding this conversation her testimony was somewhat more credibly offered.

b. June 26 Burton and Roberts' meeting with Peto

In the early afternoon of June 26, shortly after he clocked in, Peto was called into a meeting with Roberts. The meeting was held in a room called the "coaches office." The room was approximately 30 feet square and served as Roberts' office and was also used by other managers. Burton was present, but did not speak. Merchandise manager, David Counts, was also present. Counts was a supervisor who was in the office on unrelated business and his presence during the discussion between Roberts and Peto was a coincidence, but the reason for his presence was not explained to Peto. It is undisputed that no other employees were present. Peto, Roberts, Counts, and Burton each testified about the incident. Peto testified that following the conversation he returned to his work area. He said he told two or three other employees what had happened, but the only one he recalled by name was employee Linda Brown. Brown was not a witness.

Peto offered the following account of the June 26 conversation.

Q. What did Greg Roberts say to you?

A. He said, "What's going on?"

Q. And when he said this, what was your perception of his demeanor?

A. He appeared to be very angry and upset.

Q. How could you tell that he was very angry and upset?

A. He was leaning into me, basically staring me down, h[is] hand was shaking, and I could just, you know, tell it in his voice.

Q. What did you say to him?

A. I said, "I don't know what's going on."

Q. What did he say?

A. He said, "I hear that you're circulating a petition."

Q. Did you say anything?

A. I said, "I really don't want to talk about that."

Q. What did he say?

A. He said, "Well, did you sign a petition?"

Q. What did you say?

A. I said, "Yes, I did."

Q. What did he say?

A. He said, "Well, if you signed a petition, then you're as responsible as the other people."

Q. What did you say?

A. Well, he then continued on. He said that if—" that you're causing a disturbance and disruption in the Club for, you know, signing the petition."

Q. Did you say anything at that point?

A. No, I did not.

Q. Did he ask you what was on the petition?

A. Yes, he did.

Q. Do you recall exactly what he said?

A. I can't recall word-for-word what he said, no.

Q. Okay. Do you recall your response to his questions about what was on the petition?

A. Yes, I do.

Q. What did you say?

A. I said yes to all questions except for the very last one which I honestly cannot remember if it was on the petition or if it was not on the petition.

Q. Did he ask you where the petition was at that time?

A. Yes, he did.

Q. What did you reply?

A. I said, "I don't know where the petition is."

Q. Was that a true statement?

A. No, it was not.

Q. Did you know where the petition was?

A. Yes, I did.

Q. Where was it?

A. It was in my back pocket.

. . . .

Q. What else did Mr. Roberts say to you at that time?

A. He wanted to know if someone on the outside or a union was telling me to circulate the petition.

Q. And what did you say to him?

A. I said, "No, they were not."

Q. Did he ask you—rephrase. Did he indicate to you what future actions he would take in regards to the petition?

A. He said that he would send feelers out into the Club to see what the mood of the Club was and where the petition was.

. . . .

Q. How long was this conversation with Mr. Roberts total?

A. About 20 or 30 minutes.

Counts offered the following version of the June 26 conversation. Counts, Burton, and Roberts were in Roberts' office. Peto walked past the open door of the office and Roberts asked him to come in. According to Counts, Roberts asked Peto if he knew anything about a writing going around concerning some associates upset about wages. Peto replied that he didn't know anything about it and Roberts told Peto that he could feel free to use the open door policy and they could not address issues unless they were made aware of the issues. Counts described Robert's demeanor as "regular conversation," that he was professional, did not appear angry, did not raise his voice, and did not lean into Peto. Counts specifically denied that Roberts said

that he had heard that Peto was passing around a petition, that he said that Peto was causing a disturbance, that he asked Peto if he had signed the petition or that Roberts told Peto that if he signed the petition he was just as responsible as the other people. Counts also denied that Roberts asked Peto if someone on the outside or a union was asking him to do this. Counts testified that he did not recall that Roberts asked who had the petition or saying that he was going to put feelers out to find out what was going on.

The following is a summary of Burton's testimony describing the June 26 meeting. She remembered Roberts asking Peto if he knew anything about the writing and that Peto said he did not. She denied that Roberts used the word "petition." She related that Roberts asked Peto if there were issues that they could address and that Peto said there were not. She did not recall if Roberts referred to an open door policy. Burton described the tone of the conversation as calm and denied that Roberts raised his voice or displayed anger verbally or nonverbally. She denied that Roberts leaned into Peto and testified that they were about five feet apart. Burton testified that she did not recall Roberts telling Peto that he heard that Peto was passing around a petition or that he was causing a disturbance. She did not recall Roberts asking Peto whether he had signed a petition. She denied that Roberts told Peto that if he signed the petition, he was just as responsible as the other people were. She denied that Roberts asked Peto who had the petition or Peto stating that he did not know who then had the petition. She denied that Roberts' said he was going to put out feelers.

In her affidavit taken during the investigation Burton stated:

> Within two days after this conversation, I remember a conversation in Greg's office. Alan Peto, Greg, and myself were present. It happened some time after 1:00 p.m. because Alan usually starts work at 1:00 p.m. I remember Greg asking Alan if he knew anything about the petition, and Alan said 'no.'. . . At the time Greg told him what a great asset he was to the company, and at the time Greg asked Alan what he could do to make him happy. I remained quiet throughout the conversation. The conversation was five to seven minutes.

Roberts offered the following version of the conversation.

> A. Mr. Peto was going towards his work area, and was asked if he'd come in and have a conversation with us.
>
> . . .
>
> Q. When he came into the room, did he sit down?
>
> A. Yes.
>
> Q. And you were seated?
>
> A. Yes.
>
> Q. And Ms. Burton was seated?
>
> A. Yes.
>
> Q. Okay. How about Mr. Counts, was he standing or seated?
>
> A. As I stated, I believe he was standing over by the file area, in fact, I think he was in there inadvertently. It was just going to be Donna and myself and Mr. Peto in the conversation, but I think David came in to pick up some paperwork.
>
> Q. When Mr. Counts was standing, was he standing within three feet of Mr. Peto, or was he further away?
>
> A. I'd say he was about five feet, a little bit more probably, right in that range.
>
> . . .
>
> A. The conversation was predominantly me speaking to Mr. Peto.
>
> My conversation was brief and just basically, . . . do you know of any concerns that are out there, as we've discussed before, you know, if I don't know what the concerns are, I can't react to anything. And I'd asked him if he had any concerns, he said no. He had been pretty short with his answer. At that point, I asked him, you know, some of the concerns that were brought to my attention are you know nothing about, and he again said no.
>
> Q. Did you identify what the concerns were, as you knew them?
>
> A. The only thing that I'd known at that point was that there was something in writing, and it was concerns of pay, and I believe that I did, yes.
>
> Q. Okay. And so you told him that you heard that there were concerns and there was something in writing—concerns about pay, and that there was something going around in writing?
>
> A. Yes.
>
> Q. Okay.
>
> A. He said no. I basically told him, you know, we have an open door policy. If you feel that it's something we need to hear about, as we've discussed in meetings, it'd be something that would be important so that I know, so if there is any way we can address, we'd like to.
>
> Q. Did you ask him if he'd seen something going around in writing?
>
> A. No.
>
> Q. Did you ask him if he had something in writing that he physically was in possession of?
>
> A. No.
>
> Q. At any time—well, let me ask you. How long did the conversation last?
>
> A. Between five and ten minutes. It was a pretty short conversation.
>
> Q. Did Mr. Peto ever offer information to you affirmatively or did he volunteer any information to you at any time during the conversation?
>
> A. No, he did not.

Based on my assessment of the demeanor of the witnesses and the probabilities, I conclude that none of the witnesses were entirely accurate or credible in their testimony regarding the June 26 meeting. I am convinced that Peto greatly embellished and exaggerated his account, making it difficult to objectively separate fact from fiction. His melodramatic description of Roberts being so angry that his hands shook as he leaned into Peto was unconvincing. Testimony regarding significant parts of his testimony was elicited by leading questions. The testimony of Counts, Burton, and Roberts was largely conclusory and their claimed lack of recall regarding significant details is suspect.

I found credible the testimony that described the meeting as being shorter that the 20 to 30 minutes claimed by Peto. It appears most probable that the meeting lasted no longer than 5–10

minutes. I credit Peto's testimony that Roberts described the document a petition. The testimony offered by the Employer that there was no mention of a petition on June 26 was not credibly offered and appears improbable. The testimony that the petition was referred to as "something going around in writing" seems contrived and was unconvincing. The document was clearly a petition and Burton acknowledged that she had spoken to a number of employees about the matter before she spoke with Peto on June 25. Burton never claimed ignorance of the nature of the document. It seems probable that the Employer knew that the document was a petition and described it as such in the June 26 meeting.

Based on my observation of the witnesses and taking into account the probabilities, I conclude that credible evidence establishes that the meeting was tense and that it was not "regular conversation" as described by Counts. I credit Peto's testimony that Roberts began the meeting by asking Peto, "What's going on?" that Peto replied, "I don't know what's going on," that Roberts told Peto that he had heard that Peto was circulating a petition about associates' wages and that Peto answered that he did not want to talk about it. Thus, I found Peto's account of what was said initially to be credible, except that I credit Counts' testimony that Roberts described the petition as addressing wages. The balance of Peto's testimony regarding the meeting was partly illogical, was not convincing and is not credited. I find that the meeting ended with Roberts telling Peto that he could feel free to use the open door policy and the Employer could not address issues unless they were made aware of the issues. The credible evidence does not permit more detailed findings regarding what was said.

c. Peto's letter in early July to corporate management

In early July Peto sent an undated two-page letter to Greg Spragg, a regional vice president of the Employer. The letter included a partial description of Peto's version of the June 26 conversation in Roberts' office. The letter expressed concern that Roberts would discriminate against Peto because of the petition, registered concern regarding working conditions at Store 6382, and requested Peto's transfer to another store. I have considered this letter in resolving the credibility issues regarding the June 26 meeting.

d. July 28 discipline of Peto

On July 28 Peto was called to Roberts' office. Roberts, Donna Burton, and director of operations, Scott Voth, were initially present and each testified regarding the meeting. The testimony about the part of the meeting when all four were present is largely consistent. A composite of the credibly offered and probable testimony establishes that Voth told Peto that he wanted to discuss a report he had received regarding Peto carrying a concealed taper ecorder in the store and indicated that this concerned him. Peto admitted that he had been tape recording. Voth asked Peto if he was then taping their conversation and Peto said that he was. Voth asked him to take out the recorder, which was concealed, and turn it off. Peto complied. Voth asked Peto why he was doing this, and Peto said he did not wish to discuss the matter with Roberts in the room. Voth instructed Roberts and Burton to leave the room and the conversation continued. The accounts of Voth and Peto vary.

Voth describe what was said next as follows:

> Alan then said that he felt he had to do it to cover his butt. And I said from what, your evaluations have all been high. The feedback I get from your management team is you do a good job, I'm just trying to understand why he would find the need to do that.
>
> Didn't get a further explanation from Alan. I then informed him that because he was covertly taping, that I was going to administer a decision-making day.

In contrast, Peto testified:

> I told him why I decided to bring a tape recorder to work, mainly being that I felt that I would be interrogated or questioned again about the petition, and also I felt I was being targeted because of prior union activity.
>
> . . .
>
> He said he didn't know anything about any petition or prior union activity, and that I would be receiving a D-day for bringing a tape recorder to work.

I credit the testimony of Voth over that of Peto because it was more credibly offered and seems more probable. Voth acknowledged that at the time he met with Peto, he had been told by Roberts that reports had been received from employees that Peto had asked employees to sign a letter to Tom Grimm regarding wages. Voth testified that he was unaware of Robert's asking Peto about whether "there was something in writing going around" among employees prior to the July 28 D-day. To the extent that Voth's testimony is offered as a denial that he had knowledge that Roberts had met with to Peto about the petition prior to July 28, that denial is not credited.

Voth credibly testified regarding what then occurred. He gave Peto a completed "Coaching For Improvement" form imposing D-day discipline and told Peto that he would have to take a day off and that he would have to write an action plan before he came back to work. Peto signed the form. Voth had Roberts sign the D-day form as supervisor and Burton as a witness. Voth's name does not appear on the D-day form and he did not sign the form. Voth credibly testified that he had no further involvement in the discipline and did not review Peto's action plan or discuss the matter further with Roberts or Burton.

Decision making day or D-day discipline is the third and final step in the Employer's formal progressive discipline system called "coaching for success" that is described in a written corporate policy statement. The first two steps are "level one—verbal coaching" and "level two-written coaching." The Employer's policy statement describing the coaching for success program emphasizes that coaching for improvement is designed to be progressive, but permits management to skip steps. The policy states that if an employee engages in other conduct that would warrant a second D-day within 12 months, the employee is subject to immediate discharge. An employee who is being disciplined with a D-day is required to take the next work day as a paid day off for self-evaluation and to prepare a written "action plan" describing planned improvement. The policy statement provides that on the first day that the employee re-

turns to work the employee's supervisor will review the action plan with the employee.

The policy also describes what is designated "level four-termination." The policy states that level four addresses gross misconduct and that coaching for improvement will not be used to address gross misconduct. Indeed, level four misconduct makes an employee subject to immediate discharge. One category of gross misconduct described it the policy statement is "Serious Harassment/Inappropriate Conduct." In addition to gross misconduct, the policy statement defines two categories of employee conduct that would warrant discipline under the progressive coaching for success program. One is deficient job performance and the other is misconduct. Several examples of misconduct are listed. One example is "harassment/inappropriate conduct." The policy does not provide specific examples of deficient job performance, but defines it as not meeting reasonable expectations and standards. There is no evidence and no contention that Peto's job performance was deficient. To the contrary, he had a history of favorable performance reviews.

The D-day warning issued to Peto states:

> The following was observed of this Associate's behavior and or performance: Alan was observed concealing a tape recorder and microphone. *Alan made other associates aware he was utilizing the recorder to tape record conversations with managers to "cover his butt."*
>
> What is the impact of this behavior/performance on customer service, other Associates, and the profitability of the operating unit? *Negative impact on the morale of all Associates within the building: Creates a hostile work environment.*
>
> The behavior expected next time: *If there is any feedback from other Associates, actions taken by Alan or any type of conduct which effects morale in a negative fashion within the Club Alan will be terminated.*

The italicized words were handwritten on a form, inferentially by Voth.

On issuing the D-day discipline, Voth called Burton and Roberts back into the office, They signed the D-day form, gave it to Peto to review and sign and instructed him to submit an action plan. Peto then left the store, went to his home, prepared an action plan and sent it by fax to Burton. In the action plan stated:

> Alan's plan of action to address the coaching:
>
> 1. Come into work on time like usual.
>
> 2. Report to workstation and perform job responsibilities as listed and instructed as usual.
>
> 3. Only talk to other associates regarding job function/related issues only, will politely not talk to them regarding any other non-job related issues (Will still greet associates like usual 'Hello', etc. but will not go beyond that unless it has to do with member service or job related functions).
>
> 4. Members will still be given the same high attention and service they always receive with me.
>
> 5. Will not be personally concerned with or listen to any Sam's Club/Wal-Mart internal disputes, internal problems, rumors, gossip, etc. unless told to do so by management (see bullet #3). I simply will clock in and do my job and then leave.
>
> 6. Meet all goals and standards to the best of my ability as usual.
>
> 7. Leave for the end of the day and not exceeding 37. 5 hours per week unless otherwise instructed by a manager.
>
> A detailed chronological report of what I did that day can be provided if needed.

Peto testified that he then called the store and spoke to Burton, telling her that he was going to fax in his action plan and she said that would be fine. He testified that he then faxed the plan to the store and called Burton and asked her if it was an acceptable plan. According to Peto, she told him that it was an acceptable plan and that he believed that she said that she had to given it to Roberts.

Burton confirmed that Peto called her to tell her that he was sending the action plan by fax and that she told him that she would be sure to take it off the fax machine. She testified that she took the fax off the machine and took it to Roberts' office and left it for him because of the confidential nature of the document, but testified that she did not review the action plan.

Burton denied that she had the second telephone conversation with Peto that day, as described by Peto. She specifically denied indicating to Peto that the action plan that Roberts had issued to Peto was acceptable, states that she was not the person who issued the D-day discipline and that the person who had issued the D-day would review that adequacy of the action plan. The General Counsel argues that these denials should not be credited, and points to asserted inconsistent statements in the affidavit she gave during the administrative investigation, mentioned earlier. The pertinent portions of the affidavit were not read into the record. Burton's testimony on cross-examination included the following testimony regarding the affidavit:

> Q. So this is not your statement, correct?
>
> A. That is my statement, but it's incorrect.
>
> Q. This is your statement. So if it's your statement, then your statement at the time was you recall receiving—you recall reviewing Alan Peto's plan of action after his D-day discipline, correct?
>
> A. Yes.
>
> Q. And if it's your statement, then you stated Alan asked you if that plan of action would be okay, correct?
>
> A. Correct.
>
> Q. And if it's your statement, then you said it would be fine upon his faxing it over to you, correct?
>
> MR. WHEELESS: Objection; vague as to time, specifically before or after the faxing.
>
> THE COURT: Overruled. You can clarify that yourself—
>
> . . . .
>
> Q. And in your statement, you said that you—you said that it, the plan of action, would be fine, correct?
>
> A. Yes.
>
> THE COURT: Ma'am, are you saying that's what your statement says, or are you saying that's what happened?
>
> THE WITNESS: That's what my statement says.

Q. (By Mr. Twyman:) And it's your testimony now that you do not recall reviewing his plan of action, correct?

A. Correct.

. . .

Q. And it's your statement now that you do not recall saying the plan of action would be okay, correct?

A. Correct.

Burton testified that it was her understanding that Voth had issued the D-day. As noted earlier, while Voth gave the D-day warning to Peto and inferentially was its author, Roberts was actually the supervisor who signed the form.

The conflicting testimony regarding the purported second telephone conversation between Burton and Peto is relevant to an argument advanced by the General Counsel, discussed later in the analysis section, that Peto's tape recording was a pretext for issuing the D-day discipline and that Peto was unlawfully restricted in soliciting.

I was not favorably impressed with the testimony of either Peto or Burton regarding a second telephone conversation on July 28. Based on their demeanor and the probabilities, I conclude that there was a second conversation between Peto and Burton regarding his faxing the action plan, but that the testimony of Peto regarding what was said was not convincingly offered and is improbable. It seems probable that Peto did have a second telephone conversation with Burton. The wording of the action plan is not responsive to tape recording and the record suggests that it was a calculated attempt by Peto to bolster his claim that the Employer's stated concern about tape recording was a pretext and that the D-day impermissibly restricted solicitation. It does not seem probable, however, that Burton would have told Peto that "it was an acceptable plan." It is improbable that she would have presumed to assess the adequacy of Peto's response to a D-day issued by Voth, a management official above the store manager. I do not credit Peto's testimony on this issue. The testimony regarding the affidavit is insufficient to warrant a different conclusion. Thus, I conclude that the evidence does not establish that Burton voiced approval of the action plan.

Roberts testified that he had the day off when Peto first returned to work following the D-day. Roberts said that on the next day he returned to work he asked Burton whether Peto had submitted an action plan and she said he had. According to Roberts, he never reviewed Peto's action plan and had never seen it until the unfair labor practice proceeding. Roberts testified that either he or Burton should have reviewed the action plan and that they had "screwed up." This testimony is highly improbable and was not credibly offered. Peto's tape recording was considered so significant that Roberts brought the matter to the attention of management above the store level. Voth personally handled the discipline, and required Roberts to sign as the supervisor issuing the discipline. Voth clearly delegated to Roberts the responsibility to followup on Peto's action plan. Robert's denial that he inquired about the action plan when he returned to work, but did not read it, is not credited.

The credible evidence shows that no supervisor or manager ever met with Peto to review the action plan with him, as specified in the corporate policy discussed earlier. The only evidence of such a review is Peto's testimony that Burton told Peto in a telephone conversation that his action plan was acceptable and that testimony has not been credited.

e. November 17 Voth's conversation with Peto

Voth and Peto had a conversation at Store 6382 regarding the Employer's rules on solicitation and distribution. Peto did not remember the exact date, which is not critical, but a file memo prepared by Voth immediately after the conversation shows the date to have been November 17. Sometime before the conversation Peto became involved in organizing activities on behalf of the Union.

Peto testified that as he was leaving an employee breakroom, Voth asked to speak with him. Peto testified that Voth said that he heard that Peto was talking about the Union on the clock and he wanted to make Peto aware of the Employer's no-solicitation/no-distribution policy. Peto said that Voth told him that he could talk about the Union while he was on his break or at lunch in the breakroom, but not in the work area. Peto said that he asked Voth about United Way and Children's Local Network, asserting that the Employer had employees solicit for money for these organizations while they were on the clock. Peto testified that Voth replied that these were allowed, as they were part of a company program.

Voth also testified regarding the conversation. He specifically denied telling Peto that the Employer's policy prohibited talking about the Union on the clock and testified that he told Peto that he was prohibited from soliciting for the Union on the selling floor. Voth's testimony on this issue is credited because it was more credibly offered and is more probable. Voth identified a memo regarding the conversation that he credibly testified he made immediately after the conversation. The memo was received into evidence without objection. The memorandum reads as follows:[3]

11/17/00

On Nov 17 2000 I informed Allen Peto that associates had expressed concerns that he was handing out union literature and inviting associates to union meetings while on the sales floor and while they were clocked in. I let Allen know that he had the right to engage in union activity but that the company also had the right to enforce policy. I informed him that Sam's has a no-solicitation policy and that we do not allow anyone to solicit on our selling floor and to our associates while clocked in. I informed him that I was giving him fair warning of this policy. He responded with "What about Associates being solicited for the United Way?" I told him that the United Way campaign was arranged by the home office.

He said "OK" then walked to the membership desk.

Scott Voth [signature]

Based on considerations of demeanor and the probabilities, I find Voth's memo to be the most reliable and accurate account of what was said.

[3] The spelling and punctuation are as in the original. With the exception of the signature of Voth the original was hand printed in all capital letters.

2. Incidents involving Allen Kelley

a. Late July–early August conversation between Roberts and Allen Kelley

Employee Allen Kelley offered the following account of a conversation he said he had with Roberts at Store 6382 on an unspecified day in late July or early August.[4] No one else was present. Roberts approached Kelley and said that they needed to discuss the "U-word." Kelley asked what Roberts was talking about and Roberts replied, "You know what I'm talking about, the U-word." When Kelley continued to say he did not understand, Roberts told Kelley, the "union word." Roberts told Kelley that he was upset with Kelley because he had spoken to some fish vendors who were a billion-dollar concern with the Sam's Club division of Wal-Mart Corporation and accused him of speaking to the vendors about low morale and productivity of the store and suggesting to the vendors that perhaps what was needed was a good union. Kelley testified that Roberts went on to ask if it did happen, which Kelley admitted after Roberts said he had witnesses. Roberts was described as angry, telling Kelley that he was lowering morale and productivity in the store by saying things like that, and it was a negative comment that might hurt business. Roberts explained that this fish vendor was a very major concern from Hawaii. Roberts added that Kelley told him to not speak to anyone else regarding anything concerning the U-word and union matters and instructed Kelley to discuss these matters with Roberts, in his office only, and not speak with anyone else concerning union matters whatsoever. Roberts then told Kelley that unions were not good for employees because management could not get rid of rotten apples, unions take money from your pocket, and basically they were crappy. Kelley testified that Roberts contended that an employer could not effectively deal with the employees where there was a union. Roberts informed Kelley that Wal-Mart had a policy about not discussing unionization or unions at Sam's Clubs, and furthermore that Kelley was not to discuss this matter with anyone. Kelley testified that Roberts told him to not to speak with Alan Peto about his union concerns. According to Kelley the conversation concluded with Kelley remarking that he was a former union steward and that unions tend to protect employees from abusive management decisions.

Roberts testified that in late July or early August a man named Jed, a part owner of Seafood Hawaii spoke with him at the store about Kelley. Roberts stated that Jed approached him and said that he might have a problem. Seafood Hawaii was a supplier. Jed reported that Kelley had told him that Sam's Club sucked, that he did not enjoy working there and something to the effect that the employees needed a union. Roberts testified that he apologized to Jed and thanked him for telling him and letting him know that he should "talk to one of my associates, who's obviously upset about his job."

Roberts testified that later the same day he was working in the marketing office on a computer and Kelley approached him on another matter and Roberts opened a discussion of Kelley's conversation with Jed. Roberts offered the following account of the conversation. Roberts began by telling Kelley that Jed from Seafood Hawaii had a conversation with him and Kelley said, "Oh that." Roberts told Kelley that Jed said that Kelley was very upset about work and Roberts pointed out that Jed was a vendor and that was not the forum to correct problems, pointing out that the employer had an open door. Roberts stated that this was the only conversation he had with Kelley on the subject. Roberts denied the truth of the statements Kelley described in his testimony and denied that the discussion occurred in the electronics department. Roberts testified that he viewed it as being a problem for an employee to "badmouth" the company to a vendor.

The General Counsel, the Union, and the Employer have each advanced arguments addressing the resolution of the credibility issues presented by the versions of this conversation described by Kelley and Roberts. There is objective evidence of reasons for bias by both Roberts and Kelley. Roberts supported the Employer's opposition to unions and was responsible for Kelley's later termination, while Kelley testified as a former employee who had resigned under pressure for alleged unprotected misconduct of a serious nature and who had been "coached" repeatedly for reasons unrelated to protected activity. Kelley had received a level 2-written coaching unrelated to protected activity on July 14. The General Counsel acknowledges that at the time of the conversation at issue Kelley was not an open organizer and the evidence does not establish that he would have been viewed as an ally of Peto.

I was not favorably impressed with the demeanor of either Roberts or Kelley. Moreover, the accounts of both seem improbable. Roberts' version is brief in the extreme and lacking in detail. In contrast to Roberts, Kelley's testimony appears to have been greatly exaggerated and embellished and it was not offered in convincing fashion. Considering all the foregoing and my observation of the witnesses, I find that Roberts' account was as credibly offered and is as probable as that of Kelley. The General Counsel had the burden of establishing the credibility of Kelley over that of Roberts regarding what was said during their conversation, which is alleged to have violated Section 8(a)(1). If the factors favoring the credibility of Roberts are in equipoise with factors favoring Kelley, the alleged statements as described by Kelley cannot be found to have occurred. In *Tomatek, Inc.*, 333 NLRB 1350 (2000); *El Paso Natural Gas Co.*, 193 NLRB 333(1971). This is not to say, however, that a finding of a violation cannot be found based on the statements admitted by Roberts in his testimony if they are otherwise unlawful or that his admitted statements cannot be considered in deciding if the Employer has otherwise violated the Act.

b. September 3 D-day discipline of Kelley

On September 3, Roberts imposed D-day discipline on Kelley for malicious gossip. The credible evidence shows that during the 4-month period before September 3 Roberts had counseled Kelley several times regarding gossip at work. One of the earlier events involved employee Charles Johnson, who had told Roberts that he would like to get into a supervisory role, but he had been told that he would never be promoted because Roberts had it in for him. Roberts asked Johnson where he got that information and Johnson said that the source was Kelley. Roberts assured Johnson that the report was not accu-

[4] On August 8 Peto filed the initial unfair labor practice charge against the Employer. The record is insufficient to determine whether this asserted conversation was before or after the filing of the charge.

rate and that the only obstacle to his advancement was his availability. Roberts asked Kelley if Johnson's report was true and Kelley admitted that it was. Kelley told Roberts that he had heard the report from someone else, but that he could not remember of the employee. Roberts counseled Kelley regarding the Johnson incident, telling Kelley that such gossip was harmful to the workplace, showed a lack of respect for the individual, caused a hostile working environment, and that Kelley should refrain from talking about people unless he had first hand information.

The September 3 D-day form notes that Kelley had been coached on numerous occasions regarding gossip and describes two recent problems with gossip by Kelley that occurred after Kelley had been coached regarding the Johnson incident. One was admitted statements by Kelley to other employees regarding Roberts' salary that were factually not correct. The other involved statements by Kelley to the night crew team leaders that another team leader was being transferred to nights to clean up the mess and possibly replace one of the current team leaders. Roberts credibly testified that Kelley's remarks to the night crew had resulted in team leader Candy Profit coming to Roberts in tears. After reassuring Profit that the report was untrue, Roberts had asked Kelley about the matter. Kelley had initially denied that he was responsible for the report, but later admitted it. Roberts testified that this was the last straw, and was the motivation for giving Kelley a D-day. Roberts and Scott Fairrington, Kelley's immediate supervisor, met with Kelley and issued the D-day.

Kelley, Roberts, and Fairrington testified regarding the D-day, although Fairrington did not describe the meeting in detail. While the accounts of Roberts and Kelley differed in some aspects, they are largely consistent. Kelley's version set forth below is credited. According to Kelley, Roberts' demeanor was anger and that he said that Kelley had told the night crew team leaders that another team leader was being transferred to nights to clean up the mess and possibly take over a section of hard lines at night. Kelley testified that at first he denied it had then admitted he did it, explaining that everybody knew about it and were talking about it. Kelley stated that he had warned Kelley before about malicious gossip and that if he was a disgruntled employee, that he should just quit and that if he was unhappy there, he should leave. Kelley said that Roberts said that he had a big mouth and that he was lowering morale and productivity in the store by generating these rumors. Roberts then said that Kelley would be given a D-day. Kelley states that he argued that the discipline was unfair and challenged Roberts to fire him. Kelley testified that he became upset and said "[T]his Sam's Club sucks, you know, the way you're treating me. I said, I guess I should just go home and shoot myself. You never know, I might have some weapons in my car in the parking lot." Kelley was a former military policeman and law enforcement officer. Kelley said he signed the D-day form and left. On cross-examination Kelley acknowledged that in an affidavit given during the administrative investigation of the charge he said "I want to add that I lost it when I made the threats against Roberts in the store." The D-day process was never completed because Kelley ultimately resigned his employment.[5]

3. Evidence of the Employer's practice regarding solicitation

The General Counsel placed in evidence the Employer's statement of corporate policy regarding solicitation and distribution of literature.[6] The statement includes the following:

> Working Time:
>
> Associates may not engage in solicitation ... during working time. This applies to activities on behalf of any cause or organization.
>
> Selling Areas:
>
> Solicitation . . . is not permitted at any time in selling areas during the hours the store is open to the public.

Voth testified in substance that the Employer's no-solicitation policy does not limit nonwork related conversation, including union talk, so long as there is no element of solicitation. Voth testified that it would not be a violation of the policy for an employee to ask another employee to go out for dinner or ask if the employee was going to church on Sunday. Voth distinguished those types of conversation from personal direct sales, such as an employee selling Mary Kay or Amway products. The record does not establish that these distinctions were communicated to employees. Rather, they were among various hypothetical situations posed by counsel.

The General Counsel introduced evidence in support of a contention that the actual practice of the Employer was to permit employee to solicit other employees on work time and in selling areas during times the store was open. Rose Marie Coffee was formerly a jewelry salesperson who worked at Store 6382, but not as an employee of the Respondent. Rather, she worked for another employer in what appears to have been a leased department. She testified that in July or August she was on break and went to the electronics department where Kelley was working and opened a conversation with him about buying a cruise, using Kelley as a travel agent. Selling cruises was a personal business activity of Kelley's unrelated to his job with the Employer. Coffee later bought a cruise through Kelley. She testified that she had other conversations about the cruise with Kelley when he spoke with her in the jewelry department. She testified that these conversations occurred "Usually while I was working, and you know, he was all over the place, and as he was coming by, he said, 'Oh, by the way,' you know, this or this or that." The jewelry sales area was near the front entrance of the store. This testimony by Coffee is credited.

Kelley testified that once in late August after he had spoken to Coffee in the jewelry department, Fairrington approached him in the electronics department and asked what he had been doing in the jewelry department, stating that he belonged in the electronics department. Kelley testified that he answered "I'm selling her some travel, buddy." According to Kelley, Fairrington responded by saying, "You need to focus on your electron-

[5] The General Counsel does not contend that Kelley was constructively discharged, the evidence does not support such a conclusion and the issue was not litigated.

[6] The Employer's policy and practice regarding distribution of literature is not an issue and was not litigated.

ics department." Kelley testified that he replied, "Okay, but I've got to make some money, since I don't make a ton of money here." Fairrington walked away. Kelley testified that he never received any subsequent discipline for his actions that day. This testimony by Kelley is credited.

The General Counsel also offered credible testimony by Kelley that he had discussed politics at the store and that on two occasions he had discussed sports with Roberts in his office. Kelley said that he also discussed cars and women with Fairrington and that he discussed marriage and family with Burton. Kelley was not told that these nonwork related conversations were grounds for discipline.

Kelley also described purported attempts by various supervisors who were not on break to sell Girl Scout cookies to employees on break. His testimony rambles on at some length, but objectively the only relevant testimony is that on one occasion at an outdoor smoking area where Kelley was present for 5–10 minutes while on break, Burton encouraged him to buy Girl Scout cookies from her. This portion of his testimony regarding Girl Scout cookies is credited, but the balance of his testimony on the subject of Girl Scout cookies was not credibly offered and is not credited. Moreover, Kelley's testimony that Burton was not on break is lacking in sufficient foundation to show that he had a reasonable basis for knowing whether or not she was not on break and appears to be no more than speculation.

The General Counsel called Michael Landis as a witness. The Employer stated that Landis was a supervisor. After he testified, an affidavit he gave to the Board during the administrative investigation was provided to the Employer's attorney. The affidavit states that Landis had been advised that he might be a supervisor whose statements would bind the Employer and that ordinarily the Employer's attorney would be allowed to be present. Landis states in the affidavit that he did not want any attorney from the Employer to be present and that he would not give the statement if an Employer attorney were present. The Employer moved to strike his testimony because the Employer's attorney was not given an opportunity to be present during Landis' interview. I reserved ruling on the issue. I decline to strike the testimony. Landis' testimony was that he had discussed sports and politics with Roberts on the clock and that Roberts had announced an employee meeting on the intercom. According to Landis, Roberts encouraged employees at the meeting to contribute to the United Way, as well as discussing sales. Landis testified that there were United Way brochures on a table in the store. Landis' testimony on these matters is credited.

Peto testified regarding a variety of other nonwork related conversations that the General Counsel and the Union urge as examples of solicitation that the Employer has permitted. Peto testified that he overheard Terry Roberts ask another unidentified employee "if they would like to help out with, like, a bake sale or a cooking type thing for a volunteer organization or charity or something to that effect." Peto identified Terry Roberts (hereafter referred to as Ms. Roberts) as being the supervisor immediately above him. She appears to have been a team leader. Ms. Roberts is not alleged to be a statutory supervisor and the issue was not litigated. Peto testified that Ms. Roberts had asked him to help her with a computer problem at her home and had invited employees to a Christmas party at her home. Peto's testimony regarding Ms. Roberts speaking to Peto and others about a bake sale, computers, and a Christmas party is not inherently improbable, is not controverted and accordingly is credited. Peto also testified that years earlier, a former manager named Curtis Hodge asked him for help with his computer, inferentially a personally owned computer, and that he also asked Peto out to dinner. No specific evidence of Hodge's supervisory authority was introduced and the issue was not litigated. Peto described various social invitations he had received at work and described overhearing employees discussing personal issues at work.

B. Legal Analysis

1. The alleged violations involving Peto

The General Counsel argues that Burton interrogated Peto about employees' protected concerted activities and created the impression of surveillance of protected activities in violation of Section 8(a)(1) when she asked Peto on June 25 if he had heard or seen anything in writing about wages going around.

In determining whether conduct violates Section 8(a)(1) of the Act, the Board does not consider the subjective reaction of the individual involved but rather whether, under all the circumstances, the conduct reasonably tends to restrain, coerce, or interfere with employee rights guaranteed under the Act. *Sunnyside Home Care Project*, 308 NLRB 346 fn. 1 (1992); *El Rancho Market*, 235 NLRB 468, 471 (1978).

The coercive questioning of employees about concerted activities protected by Section 7 of the Act is a classic unfair labor practice. Questioning employees about protected activity is not, however, inherently coercive. To determine whether or not an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether under all the circumstances the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185 (1992); *Rossmore House*, 269 NLRB 1176 (1984). In *Rossmore House* the Board held that for interrogation to violate Section 8(a)(1) either the words themselves or the context in which they are used must suggest an element of coercion or interference. The Board observed that because supervisors and employees often work closely together, it can be expected that during the course of the workday they will discuss a range of subjects of mutual interest, including ongoing protected concerted activity. The Board cited as examples of criteria (1) the background; (2) the nature of the information sought; (3) the identity of the questioner; and (4) the place and method of interrogation. The evidence here demonstrates that Peto was engaged in protected concerted activity when he prepared and thereafter circulated among his fellow employees a petition addressing wages and other employee concerns.

The conversation on June 25 between Burton and Peto was not, however, coercive. Up to that time Burton and Peto had a good working relationship and they had casual conversations about nonwork matters. There is no evidence of relevant hostility toward protected activity prior to the conversation. The conversation on the sales floor appeared at the time to be casual and was nonthreatening in tone. While Peto mentioned a lead employee he worked under, Burton appears to have been his immediate statutory supervisor and, in any case, they spoke

with one another regularly. Peto had been given favorable appraisals by Burton and they were on friendly terms. While I find that there were subsequent unfair labor practices directed toward Peto, I have been cited no authority that would warrant a finding that this conversation was rendered unlawful by the later acts that arguably would have made the conversation coercive had unlawful acts occurred first in time. The subsequent events and Burton's testimony show that her interest was not as casual as it appeared, however, undisclosed motive is ordinarily not a factor in determining whether questioning is coercive. Therefore, I conclude that there the evidence is insufficient to establish that the question asked by Burton created an impression of surveillance of employees' union activities. I shall recommend the dismissal of the allegations of the complaint relating to Burton's conversation with Peto on June 25.

In contrast with the June 25 conversation, the conversation Roberts had with Peto in Roberts' office on June 26 was coercive because of what was said and the context. In reaching this conclusion, I have considered the background of Burton's questioning of Peto the day before, how and when Peto was summoned to the meeting, where the conversation took place and who was present. There were three supervisors present. Even though Counts apparently was present only by coincidence, this fact was not explained to Peto. The meeting would have appeared to an employee like Peto to be a serious matter. Roberts did all the talking for the Employer. Roberts was the manager in what appears to have been a sizeable retail operation. The evidence does not show that Roberts had casual conversations with Peto in his office and the June 26 conversation did not occur by chance encounter. Rather, Peto was summoned to the office as he was beginning his shift. Experience tells us that management commonly raises serious personnel issues with employees at the beginning of the workday. The day before, Burton had asked about the petition and now she was sitting silently while Roberts questioned Peto about the petition. Thus, Peto's immediate supervisor appeared to be present as an informer. An employee in Peto's position would likely conclude that Burton had determined that he was responsible for the petition and had reported the fact to the store manager.

Roberts' question, "What's going on?" was an open ended demand that Peto tell Roberts what he knew about the petition. The question was accusatory in tone and, considering the hostile atmosphere, the question impliedly threatened possible adverse consequences to Peto because of his activity.

The record does not show that Peto was open in his activities at that time Roberts' said that he had heard that Peto was circulating a petition about associates' wages. This statement conveyed the message that the Employer had sources of information about Peto's activities and that the Employer was watching activities like Peto's. This message would be reinforced by the conversation Burton had with Peto the day before.

Roberts' suggestion that Peto use the "open door policy", under the circumstances, did not serve to lessen the coercive effect of the interview. Rather, it conveyed the message that concerted activity was not favored and that Peto should abandon his protected activities and evince that abandonment by bringing his concerns to Roberts.

The Employer contends that there is no timely charge to support the allegations regarding the June 26 meeting. The charge in Case 28–CA–16669 was filed and served on October 31, 2000, and alleges, in part, that since on or about July 1, 2000, the Employer had interrogated employees about their protected concerted activities, threatened employees with reprisals for protected concerted activities, and created the impression of surveillance of employees' protected concerted activities. That charge is adequate to support the complaint allegations of such acts 5 days earlier than described in the charge.

Accordingly, applying the *Rossmore House* criteria, I shall recommend that a violation be found by Roberts' questioning of Peto on June 26 about his protected concerted activities, by impliedly threatening Peto with unspecified reprisals for that activity if he did not abandon the activities and creating the impression of surveillance of those activities. See *Davies Medical Center*, 303 NLRB 195 (1991). I shall recommend the other complaint allegations relating to June 26 be dismissed because there is no substantial and probative evidence to support them.

The issuance of the D-day discipline to Peto on July 28 is alleged to be discrimination against Peto because he engaged in protected concerted activities. The D-day discipline adversely affected Peto's terms and conditions of employment because it exposed him to immediate discharge if he had a second D-day within 12 months. The Employer contends that the D-day was imposed because of misconduct by Peto. The issue will be resolved using the analytical framework established by the Board in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Manno Electric*, 321 NLRB 278, 280 fn. 12 (1996).

To set forth a violation in dual motive Section 8(a)(1) discrimination cases, the General Counsel is required to show by a preponderance of the evidence that animus against protected activity was a motivating factor in the employer's conduct. To sustain his initial burden, the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial evidence as well as direct evidence and is a factual issue. *FPC Holdings, Inc. v. NLRB*, 64 F.3d 935, 942 (4th Cir. 1995), enfg. 314 NLRB 1169 (1994); *Andrex Industries Corp.*, 328 NLRB 1279 (1999).

If the General Counsel's initial burden is satisfied, the employer can escape liability for its action by either disproving one or more of the critical elements of the General Counsel's case or by affirmatively establishing that the employer would have taken the same action even in the absence of the employee's protected conduct. *TNT Skypak, Inc.*, 312 NLRB 1009, 1010 (1993). To make such a showing, an employer cannot simply present a legitimate reason for its actions, but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *Signature Flight Support*, 333 NLRB 1250 (2001).

The evidence shows that Peto engaged in protected concerted activity by circulating a petition among his fellow employees addressing wages and other terms and conditions of employment. The nature of the activity is clearly protected and there is no substantial evidence that the circulation of the peti-

tion was carried on in a manner or under circumstances that would render it unprotected. The Employer has not contended that the circulation of the petition by Peto was not protected concerted activity. The evidence shows that the Employer was aware of Peto's circulating the petition

The General Counsel contends that evidence that Peto and others, including supervisors, had brought tape recorders to work in the past without being disciplined and that the Employer did not produce a policy against tape recorders shows disparate treatment and that the stated reason was only a pretext for the D-day discipline. I disagree. Secretly bringing a tape recorder to work to make surreptitious recordings of conversations is qualitatively different than openly having a tape recorder at work. The covert taping was not itself protected concerted activity. Discipline for taping activity like that engaged in by Peto might well be a legitimate reason for the Employer to discipline an employee, in the absence of evidence of other, unlawful motivation. Accordingly, the issue is whether or not Peto's protected concerted activity was a substantial or motivating reason for the particular discipline imposed.

Roberts was hostile to Peto's circulation of the petition. He made his feelings clear when he unlawfully interrogated Peto, impliedly threatened Peto and impliedly created the impression of surveillance of Peto's protected activity in the meeting on June 26. This evidence of hostility to Peto's protected activity and the unlawful interference with Peto's exercise of those rights is sufficient to meet the initial burden of the General Counsel.

The terms of the written D-day warning are further evidence that Peto's protected activities motivated the discipline. Roberts had brought up employee complaints about Peto's petition in the coercive June 26 meeting. The D-day warning cautions, "If there is any feedback from other Associates, actions taken by Alan or any type of conduct which effects morale in a negative fashion within the Club Alan will be terminated." This warning, read in the context of Roberts' unlawful June 26 statement regarding employee complaints, would reasonably be read by an employee as a warning that discharge might result if other employees complained about continued protected activity.

Because the General Counsel has met the initial *Wright Line* burden, the Employer must prove by a preponderance of the evidence that the D-day would have been imposed even in the absence of Peto's protected conduct to avoid a finding of an unfair labor practice. The Employer has presented an arguably legitimate reason to discipline Peto for his covert tape recording, but that is not sufficient. The burden on the Employer to prove that Peto would have been given a D-day in the absence of protected activity is heavy. The evidence presented by the Employer is insufficient to carry that burden.

Voth explained that the first two steps of the progressive discipline were skipped because he viewed Peto's behavior as serious enough to warrant an immediate D-day. Voth characterized Peto's misconduct as gross misconduct that would have been grounds for discharge. Thus, the employer apparently contends that lesser punishment was imposed of Peto's it was imposed because of Peto's otherwise good employment record. This argument is not adequate to prove affirmatively that Peto would have been given a D-day, rather than a verbal or written warning, if he had not engaged in the protected activity. The Employer has presented little more than self-serving assessments of the seriousness of the misconduct. Thus, there is an absence of objective evidence that the D-day given to Peto is consistent with the punishment typically imposed on other employees for the same or analogous misconduct. Even if it is assumed that the Employer has presented a legitimate reason for some discipline being imposed on Peto, a preponderance of the credible and probative evidence presented by the Employer does not demonstrate that that Peto would have been given a D-day for having a hidden tape recorder and covertly taping conversations at the store, even in the absence of the protected conduct. See *Signature Flight Support*, supra. Accordingly, I shall recommend a finding that the D-day discipline was discrimination against Peto in violation of Section 8(a)(1). The complaint alleges that the discrimination against Peto also violated Section 8(a)(3). There is no substantial and probative evidence that antiunion considerations were involved in the decision to issue the D-day to Peto. I shall therefore recommend its dismissal of that Section 8(a)(3) allegation.

The complaint alleges that in Peto's D-day form Voth promulgated and enforced an overly broad and discriminatory no-solicitation/no-distribution rule by prohibiting employees from talking during working time about the Union, while permitting employees The D-day form cautions "If there is any feedback from other Associates, actions taken by Alan or any type of conduct which effects morale in a negative fashion within the Club Alan will be terminated" Roberts had brought up employee complaints about Peto's petition in the coercive June 26 meeting. The quoted statement in the D-day warning, read in the context of Roberts' unlawful statement made on June 26, would reasonably be read by an employee as a warning that discharge might result if other employees complained about a continuation of protected concerted activities. The evidence does not, however, establish that the Employer promulgated a sweeping limitation on all employees' activity, but the words in the D-day form quoted above, in the context of the June 26 incident, did have the effect of impermissibly restricting Peto's exercise of his rights by threatening him with termination if any other employee complained. Accordingly, I shall recommend a finding that the D-day warning independently violated Section 8(a)(1) by limiting Peto's exercise of his protected rights.

The complaint alleges that in November Voth promulgated and enforced an overly broad and discriminatory no-solicitation/no-distribution rule by prohibiting employees from talking during working time about the Union, while permitting employees to solicit for organizations and discuss nonwork related matters during working time. The credited evidence is that on November 17, Voth told Peto that he had the right to engage in union activity, but that the company also had the right to enforce policy. He told Peto that the Employer had a no-solicitation policy and that no one was allowed to solicit on the selling floor and to our associates while they were clocked in. Peto asked Voth about employees being solicited for the United Way and Voth answered that the United Way campaign was arranged by the home office.

The no-solicitation rule articulated by Voth is not facially unlawful. An employer may prohibit solicitation and distribution on a retail sales floor, including during nonwork time. See

J. C. Penney Co., 266 NLRB 1223, 1224 (1983). This well-settled principle is not challenged.

The Union argues that the evidence shows that the Employer allowed nonunion and nonorganizational solicitation and that the policy and the manner in which the Employer interpreted its policy was disparately enforced to prohibit union or organizing solicitation and is therefore discriminatory and unlawful. In support of this position the Union cites *Cooper Health System*, 327 NLRB 1159 (1999), and *Opryland Hotel*, 323 NLRB 723, 727–729 (1997). The facts of those cases are unlike those of the present case. I have been cited no authority that would warrant a finding that an employer cannot lawfully prohibit employees from soliciting on a retail sales floor where the employer sponsors such activities as a United Way charitable donation drive. The Board has recognized an exception for such "beneficent acts." See *Hammary Mfg. Corp.*, 265 NLRB 57 (1982); *Avondale Industries*, 329 NLRB 1064 fn 4 (1999). The other examples of purported disparate treatment are insufficient to show disparate enforcement of the rule. The evidence does not demonstrate that Girl Scout cookies were sold on the sales floor or during work time. Fairrington verbally challenged Kelley about his travel agent activities and the other asserted examples of claimed disparate enforcement were not shown to be more than mere social exchanges. Accordingly, I shall recommend dismissal of the allegations relating to the November 17 conversation between Voth and Peto.

The complaint alleges that in August, in a conversation with Kelley, Roberts created an impression among its employees that their union activities were under surveillance by the Respondent; interrogated its employees about their union membership, activities, and sympathies; threatened its employees with loss of employment if they engaged in union activities; invited its employees to resign their employment because of their union membership, support, and activities; promulgated and enforced an overly broad and discriminatory no-solicitation rule by prohibiting its employees from talking about a union at anytime and only with Greg Roberts; and threatened to close the facility in order to dissuade its employees from supporting a union. The only credible evidence is that Roberts admitted in his testimony that he opened a discussion of Kelley's conversation with a seafood vendor after the vendor had told him that Kelley had told the vendor that "Sam's Club sucked, that he did not enjoy working there and something to the effect that the employees needed a union." Roberts conceded that he told Kelley that the vendor said that Kelley was very upset about work and that Roberts pointed out that Jed was a vendor, telling Kelley that it was not the forum to correct problems and pointing out that the Employer had an open door.

The Employer contends that Kelley's complaint to the vendor was not protected, arguing that under the Board's decisions in *Meyers Industries I*, 268 NLRB 493 (1984), and *Meyers Industries II*, 281 NLRB 882 (1986), an employee's action is "concerted," and therefore protected, only if the action is "engaged in with or on the authority of other employees and not solely by and on behalf of the employee himself." *Meyers I* at 497. The Employer points to the court's opinion in *Tyler Business Services, v. NLRB*, 680 F.2d 338, 339 (4th Cir. 1982). The court refused to enforce the Board's order in *Tyler Business Services*, 256 NLRB 567, 568 (1981), holding that an employee's griping and gossiping about working conditions with a customer was not protected activity.

The Union argues that talking to the vendor about the Union or working conditions was protected, citing *Handicabs, Inc.*, 318 NLRB 890, 896 (1995), enfd. 95 F.3d 681 (8th Cir. 1996), quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1987). In *Handicabs* Judge William J. Pannier III wrote:

> As a general proposition, employees do not "lose their protection under the 'mutual aid or protection' clause [of Section 7 of the Act] when they seek to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship."

I am persuaded that Kelley's remarks to the vendor, as described by Roberts, were protected. As stated by Judge C. Richard Miserendino in *Tradewaste Incineration*, 336 NLRB 902, 910 (2001):

> Section 7 of the Act protects "concerted activities for the purpose of collective bargaining or other mutual aid or protection." No union need be involved and any activity by a single employee may be protected if it seeks to initiate, induce or prepare for group action. *IBP, Inc.*, 330 NLRB 863, 866 (2000), citing *Prill v. NLRB (Meyers Industries)*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

Here the remark Kelley made to the vendor, as described by Roberts, that Sam's Club "sucked" was a comment on the working conditions generally and were not limited to Kelley's personal grievances. Kelley's remark that the employees needed a union looked toward group action. Accordingly, it was protected.

Roberts' admitted remarks to Kelley amounted to the imposition of a requirement that he not use channels outside the immediate employee-employer relationship to express his displeasure with the Employer's employment practices and the possible need for a union. Accordingly, I shall recommend a finding that Roberts remarks violated Section 8(a)(1). I shall recommend the dismissal of the remaining allegations relation to the August conversation between Kelley and Roberts because there is no credible and probative evidence to support them.

The complaint alleges that on September 3, Kelley was issued a D-day discipline in violation of Section 8(a)(1) and (3) and that at that time Roberts promulgated and enforced an overly broad and discriminatory no-solicitation rule by prohibiting discussions about terms and conditions of employment and threatened its employees with discharge for discussing terms and conditions of employment. These allegations refer to the D-day disciplinary meeting that occurred before Kelley quit. The evidence does not establish that union or protected concerted activity was a substantial or motivating reason for the Employer's action. Rather, the evidence shows that Roberts responded to unprotected activity by Kelley. Kelley's malicious gossip had been the subject of progressive discipline before his November statements to the vendor, discussed above, and Kelley does not deny the essential facts that led to the D-day. The Employer was privileged to prohibit and discipline employees for malicious gossip. *Southern Maryland Hospital*, 293 NLRB

1209 (1989). I shall recommend dismissal of the allegations relating to September 3.

CONCLUSIONS OF LAW

1. The Respondent, Sam's Club, A Division Of Wal-Mart Corporation, is an employer within the meaning of Section 2(2) of the Act engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Food and Commercial Workers International Union, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by coercively questioning employees about their concerted activities protected by the Act.

4. The Respondent violated Section 8(a)(1) of the Act by creating the impression that the Respondent was engaging in surveillance of employees' concerted activities protected by the Act.

5. The Respondent violated Section 8(a)(1) of the Act by threatening employees with reprisals for their concerted activities protected by the Act.

6. The Respondent violated Section 8(a)(1) of the Act by imposing a requirement that an employee not use channels outside the immediate employee-employer relationship to voice employee concerns about employees' conditions of employment or the need for a union.

7. The Respondent violated Section 8(a)(1) of the Act by imposing D-day Discipline on employee Alan T. Peto because he engaged in protected concerted activities.

8. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act

9. The Employer has not otherwise violated the Act.

REMEDY

Having found that Respondent engaged in unfair labor practices, I shall recommend that it be ordered to cease and desist therefrom and to take certain affirmative action to effectuate the policies of the Act.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[7]

ORDER

1. The Respondent, Sam's Club, A Division of Wal-Mart Corporation, Las Vegas, Nevada, its officers, agents, successors, and assigns shall cease and desist from

(a) Coercively questioning employees about concerted activities protected by the Act

(b) Creating the impression that the Respondent is engaging in surveillance of employees' concerted activities protected by the Act.

(c) Threatening employees with reprisals for concerted activities protected by the Act.

(d) Discriminating against any employee, including the imposition of D-day discipline, because employees have engaged in protected concerted activities.

(e) Imposing any requirement that any employee not use channels outside the immediate employee-employer relationship to voice employee concerns about employees' conditions of employment or the need for a union.

(f) In any like or related manner, interfering with, restraining, or coercing any employee in the exercise of the rights guaranteed by Section 7 of the Act.

2. The Respondent, Sam's Club, a Division of Wal-Mart Corporation, its officers, agents, successors, and assigns shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful D-day discipline imposed on Alan T. Peto and within 3 days thereafter notify him that this has been done and that the unlawful D-day discipline will not be used against him in any way.

(b) Within 14 days after service by the Region, post at its store on Spring Mountain Road in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[8] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at anytime since June 26, 2000.

(c) Within 21 days after service by Region 28, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint be dismissed insofar as it alleges violations of the Act not specifically found.

Dated, San Francisco, California, December 6, 2001.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

[7] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[8] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT coercively question you about your concerted activities protected by the Act.

WE WILL NOT threaten you with reprisals for your concerted activities protected by the Act.

WE WILL NOT discipline you because you have engaged in concerted activities protected by the Act.

WE WILL NOT create the impression that we are engaging in surveillance of your concerted activities protected by the Act.

WE WILL NOT prohibit any employee from using channels outside the immediate employee-employer relationship to voice employee concerns about our employment practices or the need for a union.

WE WILL remove from our files any reference to the unlawful D-day discipline issued to Alan T. Peto and that action will not be used against him in any way.

SAM'S CLUB, A DIVISION OF WAL-MART CORPORATION